IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

COMMONWEALTH OF KENTUCKY, *ex rel.* JACK CONWAY, ATTORNEY GENERAL,

Plaintiff,

CIVIL ACTION NO. 3:13-CV-00015-GFVT

GLAXOSMITHKLINE, LLC, formerly SMITHKLINE BEECHAM CORP. d/b/a GLAXOSMITHKLINE,

Defendant.
_____/

MOTION OF THE PARTNERSHIP FOR AMERICA AND AMERICAN COATINGS ASSOCIATION FOR LEAVE TO FILE AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

For the reasons set forth in the accompanying memorandum in support hereof, the Partnership for America ("Partnership") and American Coatings Association ("ACA") respectfully requests leave of the court to file a memorandum of law as *amici curiae* in opposition to Plaintiff's motion to remand.

Respectfully Submitted,

s/ Kirby T. Griffis
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Counsel for Amici

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, I electronically filed by means of the CM/ECF system the foregoing Motion of the Partnership for America ("Partnership") and American Coatings Association ("ACA") for leave to file as *amici curiae* in opposition to plaintiff's motion for remand, memorandum in support thereof, proposed *amici curiae* brief, and proposed order granting leave. Electronic notification of this filing automatically will be sent to all counsel of record who are registered CM/ECF users.

s/ Kirby T. Griffis
Kirby T. Griffis

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THE PARTNERSHIP FOR AMERICA AND AMERICAN COATINGS ASSOCIATION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

The Partnership for America ("Partnership") and American Coatings Association ("ACA") respectfully moves for leave to file the attached memorandum of law as *amici curiae* in opposition to the Plaintiff's motion (Doc. 19) to remand this action back to the Franklin Circuit Court.

The proposed *amici curiae* brief does not repeat any of the arguments made by the defendant in its opposition to remand and does not raise any new arguments not asserted by the defendant. Rather, *amici curiae* submit the proposed brief to assist the court in its analysis of the legal standard by which the Plaintiff's motion to remand should be analyzed. In particular, as more fully set forth in the proposed brief, governing United States Supreme Court authority and the history and plain language of Article III to the United States Constitution reject any presumption against removal and, to the contrary, affirmatively require the Court to grant removal of cases – like the present case – that fall within its removal jurisdiction.

Because there is no Federal Rule of Civil Procedure that applies to motions for leave to appear as *amicus curiae,* federal district courts often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure. *See Washington Gas Light Co. v. Prince George's Cnty. Council*, Civil Action No. DKC 08-0967, 2012 WL 832756 (D. Md. Mar. 19, 2012), *aff'd*, 711 F.3d 412 (4th Cir. 2013); *Jin v. Ministry of States Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008).[1] "District courts have inherent authority to accept or deny *amici*." *Jin*, 557 F. Supp. 2d at 136; *see also Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, No. 05-138-WOB, 2007 WL 4260517, at *1 (E.D. Ky. Aug. 30, 2007) (granting motion for leave to file *amicus curiae* brief). "[T]he aid of *amici curiae* have been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." *Washington Gas Light Co.*, 2012 WL 832756, at *3 (citing cases).

Amici curiae seek leave of the Court to address a legal issue that is of central importance to the court's analysis of the Commonwealth's motion for remand: whether the Court should approach the motion with any "presumption" in favor of remand to state court. While the Commonwealth relies on such a presumption in its remand motion, its argument is based upon seventy-year old dicta from *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) that the United States Supreme Court has specifically disavowed in a more recent opinion. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) ("whatever apparent force [the anti-removal presumption] might have claimed when *Shamrock* was handed down has been qualified by later statutory development"). Moreover, the history, intent, and plain language of Article III

[1] In accordance with Fed. R. App. P. Rule 29.1, *amici curiae*'s motion for leave and attached proposed *amici* brief is being filed within 7 days of the defendant's opposition to remand.

of the United States Constitution amply demonstrate that out-of-state defendants have an affirmative right to defend themselves in a neutral federal forum.

Amici curiae have a special interest in the constitutional and jurisdictional issues presented in this case, and bring a unique perspective not provided by the parties to the legal issue before the Court.

The Partnership is an organization dedicated to advancing common sense public policies that are rooted in America's traditions of individual freedom and free markets and consistent with the Founding principles of America. http://partnership4america .org. Several of its officers and members were involved in the coalition that promoted enactment of CAFA, the jurisdictional statute at issue in this case. It is the position of the Partnership that early and erroneous departures from the plain meaning of Article III of the Constitution have fueled the litigation explosion of the last fifty years, contributing to the imposition of billions of dollars of costs on American consumers, the loss of hundreds of thousands of American jobs, reduced foreign investment, increased medical costs, and fewer potentially lifesaving medical products being made available to the public. In support of its mission, the Partnership recently filed an *amicus curiae* brief in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), which addressed similar issues regarding the proper scope of removal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 ("CAFA").

The ACA is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. http://www.paint.org Collectively, ACA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

ACA member companies have been targeted in a number of *parens patriae* lawsuits filed by private, contingent fee attorneys on behalf of state attorneys general, and ACA accordingly has a unique perspective on the constitutional issues raised when out-of-state defendants are compelled to defend against mass action type claims in state courts. ACA has actively supporting its members' interests though *amicus curiae* briefing in many of these cases across the country, including *County of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010), *State v. Lead Industries Association, Inc.*, 951 A.2d 428 (R.I. 2008) and *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

The Partnership and ACA have no financial interest in the outcome of this litigation, and their proposed *amici curiae* brief does not address the specific factual issues raised by the parties' dispute. The Partnership and ACA instead are seeking to assist the Court in its understanding of the broader constitutional implications of its ruling, both in the context of the present remand motion and in future cases in which other out-of-state defendants seek the protection of a neutral federal forum guaranteed by the United States Constitution.

Before filing the instant motion, counsel for the Partnership and ACA contacted counsel for all parties to determine whether they would consent to the filing of the attached *amici* brief. Counsel for Defendants provided their consent. Counsel for the Commonwealth did not.

WHEREFORE, the Partnership and ACA respectfully request that this motion for leave to file their proposed *amici curiae* brief be granted.

Respectfully Submitted,

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MEMORANDUM OF THE PARTNERSHIP FOR AMERICA AND AMERICAN COATINGS ASSOCIATION AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Amici curiae the Partnership for America and American Coatings Association, contingent upon granting of the accompanying motion for leave to file, submit this memorandum of law in opposition to the Commonwealth of Kentucky's motion (Doc. 19) to remand this action back to the Franklin Circuit Court. As set forth herein, the Commonwealth's motion improperly relies on a "presumption" in support of remand that is contrary to United States Supreme Court precedent and to the intent and plain language of Article III, Section 2 of the United States Constitution.

INTEREST OF *AMICI CURIAE*[1]

The Partnership for America (the "Partnership") is an organization dedicated to advancing common sense public policies that are rooted in America's traditions of individual

freedom and free markets and consistent with the founding principles of America. http://partnership4america.org. In furtherance of these goals, the Partnership, with the assistance of former U.S. assistant attorney general Charles J. Cooper, filed an amicus brief in the United States Supreme Court in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), which addressed similar issues regarding the proper scope of removal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 ("CAFA").

The Partnership is also committed to common sense legal reform. Several of its officers and members were involved in the coalition that promoted enactment of CAFA, the jurisdictional statute at issue in this case. It is the position of the Partnership that early and erroneous departures from the plain meaning of Article III of the Constitution have fueled the litigation explosion of the last fifty years, contributing to the imposition of billions of dollars of costs on American consumers, the loss of hundreds of thousands of American jobs, reduced foreign investment, increased medical costs, and fewer potentially lifesaving medical products being made available to the public.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. http://www.paint.org. Collectively, ACA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States. ACA is actively involved in supporting its members' interests though *amicus curiae* briefing in courts across the country, including numerous cases involving actions brought

[1] No counsel for any party authored this memorandum in whole or in part, and no other person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this memorandum.

in state courts by private contingency fee counsel on behalf of state attorneys general. *See, e.g.*, *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007).

INTRODUCTION

In its memorandum in support of its motion for remand, the Commonwealth relies on the assertion that "any doubts regarding federal jurisdiction should be construed in favor of remanding the case to state court." Commonwealth of Kentucky's Mem. in Supp. of Motion to Remand ("Remand Mem.") 4-5. This presumption, while often stated, is based upon *dicta* in a 70-year old United States Supreme Court opinion which has been expressly limited by subsequent Supreme Court authority and which runs counter to both the intent and plain language of Article III, Section 2 of the United States Constitution. The Commonwealth's reliance on this presumption is particularly inappropriate in the context of CAFA, a statute that was specifically adopted by Congress to expand the scope of federal diversity jurisdiction and which Congress intended to be read broadly. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) ("[T]he definition of 'class action' [in CAFA] is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority.") (quoting S. Rep. No. 109-14, at 35 (2005)).

For the reasons set forth by the Defendant, GlaxoSmithKline LLC ("GSK"), in its opposition to the Commonwealth's motion to remand, the Commonwealth's claim on behalf of thousands of allegedly defrauded individual Kentucky consumers of the prescription medication Avandia falls squarely within the scope of CAFA and was properly removed to this Court. The

Commonwealth's attempted reliance on a contrary presumption to avoid the plain import of CAFA's jurisdictional provisions is without merit and should be rejected.

I. The United States Supreme Court Has Disavowed Any Presumption Against Removal.

Relying on dicta in *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100 (1941), the Commonwealth argues that there is a strong presumption against removal that supports its motion for remand. *See* Remand Mem. 5. But while this and other courts have continued to cite to this dicta to the present day, the United States Supreme Court more recently has disavowed any such presumption. *See Breuer v. Jim's Concrete of Brevard, Inc.,* 538 U.S. 691, 698 (2003).

In *Breuer*, the Supreme Court affirmed the removal of a suit brought under the Fair Labor Standards Act of 1938, notwithstanding a provision in the Act stating that "[a]n action to recover . . . may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). In so holding, the Supreme Court rejected the plaintiff's heavy reliance on the same language in *Shamrock Oil* cited by the Commonwealth here. The Supreme Court explained that at the time *Shamrock Oil* had been decided, 28 U.S.C. § 1441 "provided simply that any action within original federal jurisdiction could be removed," which, in light of the due regard afforded to the rightful independence of state governments, called for a narrow interpretation of the removal power. *Breuer,* 538 U.S. at 697. The Court noted, however, that fourteen years after *Shamrock Oil,* Section 1441 "was amended into its present form, requiring any exception to the general removability rule to be express." *Id*. This new "congressional insistence on [an] express exception" to removal is "hardly satisfied" by a general presumption that cases not be removed. *Id.* Thus, the Supreme Court instructed, "whatever apparent force [the anti-removal presumption] might have claimed when *Shamrock* was handed down has been qualified by later

statutory development." *Id.*; *see also* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 630-33 (2004).

Moreover, *Breuer* squarely held that there is "no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Breuer*, 538 U.S. at 698. In a series of recent opinions, the Western District of Kentucky cited to *Breuer* in correctly holding that a party seeking remand of a case removed pursuant to CAFA thus "bears the burden of showing, by a preponderance of the evidence, that one of the CAFA exceptions applies." *Wiggins v. Daymar Colls. Grp.*, No. 5:11-CV-36-R, 2012 WL 884907, at *2, *3 (W.D. Ky. Mar. 14, 2012) (*citing also In re Sprint Nextel Corp.*, 593 F.3d 669, 673 (7th Cir. 2010); *Preston v. Tenet Healthsystem Mem'l Med. Ctr. Inc.*, 485 F.3d 793 (5th Cir. 2007); *Serrano v. 180 Connect Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Evans v. Walter Indus.*, 449 F.3d 1159, 1164 (11th Cir. 2006)).[2]

The Commonwealth seeks to rely on two exceptions to CAFA in its motion for remand: (1) the exception for claims "asserted on behalf of the general public … pursuant to a State statute specifically authorizing such action," 28 U.S.C. § 1332(d)(11)(B)(ii)(III), and (2) the exception where "claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). *See* Remand Mem. 10-12, 14-15. *Breuer* makes clear that the Commonwealth bears the burden of showing the applicability of these exceptions. Further – and directly contrary to the Commonwealth's assertion that CAFA should be read narrowly to *avoid* removal – the intent and the legislative history of CAFA makes clear that it is the *exceptions* to

[2] *See also Albury v. Daymar Colls. Grp., LLC*, No. 3-11-CV-573-R, 2012 WL 884902, at *2, *3 (W.D. Ky. Mar. 14, 2012) (same); *Lancaster v. Daymar Colls. Grp., LLC*, No. 3:11-cv-157-R, 2012 WL 884898, at *2, *3 (W.D. Ky. Mar. 14, 2012) (same)

CAFA removal that should be strictly interpreted. *See* Senate Report 109-14 (explaining that the exceptions to CAFA's mass action provisions should be interpreted strictly by federal courts).

II. A Presumption Against Removal Is Contrary to the History and Purposes of Article III.

The Commonwealth's reliance on a presumption against removal also runs counter to the history and purposes of Article III of the United States Constitution. Article III was designed to establish a federal judiciary "competent to the determination of matters of national jurisdiction." THE FEDERALIST No. 81, at 485 (Hamilton) (Clinton Rossiter ed., 1961). The Framers were unwilling to rely on the state courts for this purpose, as the Antifederalists preferred, largely because "the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . ." *Id*. at 486.

Indeed, the Framers were so apprehensive of actual or perceived state court bias in favor of local interests that they considered a neutral federal tribunal necessary in some cases to the peace and harmony of the union, and they took care to extend federal jurisdiction to "cases in which the state tribunals cannot be supposed to be impartial." THE FEDERALIST No. 80, at 487 (Hamilton). In particular, Article III, Section 2 mandates that "[t]he judicial Power shall extend to," among other things, "[c]ontroversies between two or more States;— between a State and Citizens of another State,— between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

Under the Articles of Confederation, commerce between the states had been shackled by local prejudice and corresponding distrust. *See, e.g., Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992); *Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979); THE FEDERALIST No. 7 (Hamilton). The Framers well understood that if the fledgling nation was to succeed, it would have to

overcome these tendencies. The new national government was thus given ultimate legislative power over the regulation of interstate commerce, the citizens of each State were guaranteed all of the privileges and immunities of citizens in all of the States, and the States were expressly barred from enacting such then-common discriminatory measures as tender laws and laws impairing the obligation of debts and other contracts. *See* U.S. CONST. art. I, §§ 8, 10, art. IV, § 2. The new federal judiciary was correspondingly designed to provide a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated. By enabling investors and commercial enterprises to cross state lines with confidence that their legal disputes would be fairly adjudicated in new state markets, diversity jurisdiction went hand-in-hand with other constitutional provisions designed to foster development of a truly national economy.

The most vocal advocates of diversity jurisdiction included some of the leading Framers. James Madison defended diversity jurisdiction by succinctly stating its obvious rationale:

> It may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed., 1901) at 533 ("ELLIOT'S DEBATES").

John Marshall placed the point in its larger context, echoing arguments at the Constitutional Convention that a neutral federal forum for resolving interstate disputes was needed to preserve the peace and harmony of the union:

> To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to. Let us consider that, when citizens of one state carry on trade in another state, much must be due to the one from the other, as is the case between North Carolina and

> Virginia. Would not the refusal of justice to our citizens, from the Courts of North Carolina, produce disputes between the States?

Id. at 557; *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 238 (M. Farrand ed., 1911) ("cases in which foreigners or citizens of other States . . . may be interested" were a species of those "questions which may involve the national peace and harmony") (Edmund Randolph).

The most influential defense of the new federal judiciary was provided by Alexander Hamilton in his classic series of essays on Article III in The Federalist Papers. In *Federalist No. 80,* Hamilton emphasized the critical importance of a neutral forum for resolving disputes "in which the State tribunals cannot be supposed to be impartial" or "unbiased." THE FEDERALIST No. 80, at 478. As he explained:

> No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

Id. Accordingly,

> the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. [Only] that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

Id.[3]

[3] Less prominent supporters of the Constitution likewise defended the diversity jurisdiction. In the North Carolina convention, for example, William Davie explained that "[t]he security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states." 4 ELLIOT'S DEBATES at 159. Davie maintained that diversity jurisdiction was "essential to the interest of agriculture and commerce." *Id.*

The history of the framing and ratification of the diversity clause thus makes clear that it was designed to ensure that a party in a dispute with a foreign state or citizen of a foreign state would be entitled to litigate that dispute in a presumably neutral federal court rather than in a possibly biased state court. The Supreme Court, in one of its earliest examinations of diversity jurisdiction, confirmed this understanding:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); *see also, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

This history also makes clear that by ensuring that a neutral federal forum, composed of nonelected judges whose independence from "local attachments" was fortified by life tenure and salary protection, was available for adjudicating disputes between parties from different States, those who framed and ratified Article III sought to preserve national harmony and promote interstate commerce. As Justice Joseph Story explained in his classic *Commentaries on the Constitution*, "Probably no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1686 (1833). A century later, Judge John J. Parker was equally effusive:

> No power exercised under the Constitution ... had greater influence in welding these United States into a single nation [than diversity

> jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932); *see also* Chief Justice William H. Taft, *Possible & Needed Reforms in the Administration of Justice in the Federal Courts*, 8 A.B.A. J. 601, 604 (1922) ("No single element . . . in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the west and south as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.").

III. A Presumption Against Removal Is Contrary to the Plain Language of Article III.

This lawsuit brought by the Commonwealth against an out-of-state drug manufacturer falls squarely within the scope of diversity jurisdiction as intended by those who framed and ratified Article III. Thus, the Commonwealth's assertion of a presumption against removal to a federal forum is also contrary to the mandatory language of that Article, which affirmatively requires federal courts to accept jurisdiction of cases within its authority.

Article III requires that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Article III likewise directs that "[t]he judicial Power shall extend" to various enumerated categories of cases and controversies, including "[c]ontroversies ... between a State and Citizens of another State, – between Citizens of different States." *Id.* art. III, § 2. As Justice Story explained in his landmark opinion in *Martin v. Hunter's Lessee,* "[t]he language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have

refused to carry it into operation." 14 U.S. (1 Wheat.) at 328; *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 612-14 (1953).

Just as Section 1 provides that the federal judicial power "*shall be vested*" (not may be vested) in a supreme court and congressionally established inferior courts, Justice Story noted, it also provides that "[t]he judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." *Martin*, 14 U.S. (1 Wheat.) at 328 (emphasis in *Martin).* As Justice Story explained, "[t]he language, if imperative as to one part, is imperative as to all." *Id* at 330. Congress thus may no more refuse to vest the judicial power than it may "create or limit any other tenure of the judicial office" (besides tenure "during good behaviour") or "refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office." *Id.* at 328-29.

Justice Story also noted that the language of Article III vesting the judicial power mirrors that of Articles I and II:

> The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

Id at 329-30 (emphasis in original); *see also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III,* 132 U. PA. L. REV. 741, 842 (1984).

Justice Story then turned to the language of Section 2 providing that "the judicial power *shall extend*" to the enumerated cases and controversies. *Martin*, 14 U.S. (1 Wheat.) at 331 (emphasis in original). These words too, said Justice Story, are "used in an imperative sense," and "import an absolute grant of judicial power." *Id.* Thus, the "duty of congress to vest the judicial power of the United States" must be understood as "duty to vest the *whole judicial power*," else "congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all." *Id.* at 330 (emphasis in original).

In short, the plain language of Article III makes clear that the federal "judicial power shall extend to all the cases enumerated in the constitution." *Id.* at 333; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) ("The constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish." (emphasis added)). Justice Story's conclusion—that Article III mandates jurisdiction in federal courts in all enumerated cases or controversies—has substantial support in the text of the Constitution and in the historical evidence from the Constitutional Convention and the ratification debates, and it has never been satisfactorily answered.

Amici respectfully submits that Justice Story's mandatory view of federal jurisdiction reflects the most natural (and best) reading of Article III. To be sure, after identifying the classes of cases and controversies to which the judicial power shall extend and prescribing the Supreme Court's original jurisdiction, Article III, Section 2 provides that "[i]n all the other Cases before

mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*" (emphasis added). Given that Article III on its face appears to commit the creation of inferior federal courts to Congress's discretion, the Exceptions Clause of Section 2 could be understood to permit Congress to avoid vesting some of the judicial power simply by excepting certain cases or controversies from the Supreme Court's appellate jurisdiction and then declining to create inferior courts with jurisdiction over those matters. Taken to its logical end point, this reading would permit Congress to avoid vesting any of the judicial power apart from the narrow category of cases over which original jurisdiction is assigned to the Supreme Court by Article III.

Whatever force this reading might have if the Exceptions Clause is viewed only in conjunction with Congress's apparent discretion regarding the creation of inferior federal courts, it is plainly at odds with Article III's dual commands that the judicial power "shall be vested" in the Supreme Court and congressionally created inferior courts, and that this power "shall extend" to the cases and controversies identified in Section 2. Any reading of some provisions of Article III that would render other provisions of that Article meaningless should of course be avoided if at all possible. Rather, Article III should be read as a whole in a manner that gives effect to all of its provisions.

In any event, regardless of what the mandatory reading of Article III set forth above may suggest about the constitutionality of statutes restricting the diversity jurisdiction, it surely counsels against the *judiciary's* expanding statutory exceptions to the judicial power beyond their clear terms. And it plainly forecloses the rule, urged by the Commonwealth, that "any doubts regarding federal jurisdiction should be construed in favor of remanding the case to state court," Remand Mem. 3-4, let alone reliance on the counter-factual assertion that the

Commonwealth's claim on behalf of thousands of Kentucky residents does not constitute a "mass action" for purposes of CAFA.

This Court should take this opportunity not only to reject the Commonwealth's attempt to defeat federal jurisdiction, but also to hold – consistent with *Breuer*, 538 U.S. at 697-98 and the plain language and purpose of Article III of the United States Constitution – that there is no presumption requiring a thumb to be placed on the scale against removal. To the contrary, the United States Constitution provides out-of-state defendants an affirmative right to defend themselves in a neutral federal forum. As the United States Supreme Court has explained,

> the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907). In the words of Chief Justice Marshall, the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

CONCLUSION

For the foregoing reasons, *amici curiae* submit that this Court should reject the Commonwealth's assertion that there is a presumption against removal and deny its motion for remand.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

COMMONWEALTH OF KENTUCKY, *ex rel.* JACK CONWAY, ATTORNEY GENERAL,

Plaintiff,

CIVIL ACTION NO. 3:13-CV-00015-GFVT

GLAXOSMITHKLINE, LLC, formerly SMITHKLINE BEECHAM CORP. d/b/a GLAXOSMITHKLINE,

Defendant.
_____/

[PROPOSED] ORDER

In consideration of the motion for leave to file *amici curiae* brief of the Partnership for America and American Coatings Association, and any opposition thereto, it is hereby:

ORDERED that motion for leave is granted and the proposed *amici curiae* brief attached to the motion for leave is accepted onto the Court's docket. *Amici curiae* need not refile their brief.

_____
United States District Judge